



**RULING 1 OF 2013 OF THE MARITIME DISCIPLINARY COURT OF THE  
NETHERLANDS IN CASE NUMBER 2011.K1- TEMPEST**

On the complaint of:

**complainer**

Mr D.L. Elsman,  
represented by: Mr W.L.J. van Winden,

versus

**the defendant**

Mr A. V.,  
lawyer: Mr L.M. Schat, lawyer practising in Rotterdam.

**1. The course of the proceedings**

The complainant submitted a complaint against the defendant to the Maritime Disciplinary Court of the Netherlands (referred to below as: The Disciplinary Court) on 18 May 2011. The complainant submitted a copy of letter and images and video recordings with his complaint (dated 16 May 2011). The claimant has further explained his complaint in the emails of 23 June 2011, 21 August 2011 and 7 September 2011.

In his ruling of 1 June 2011 the president of the Disciplinary Court decided to institute a preliminary investigation and appointed Mr E.H.G. Kleingeld, secretary of the Disciplinary Court, as the preliminary investigator.

In his letter of 5 October 2011 the defendant's lawyer (Mr G. Elenbaas, lawyer practising in Rotterdam) submitted a statement of defence. Five exhibits were submitted with this statement of defence. On 23 October 2011 the complainant responded in writing to the defendant's statement of defence and also extended the scope of his complaint. He added 8 exhibits to his complaint, including a USB stick containing images and video recordings. In his letter of 31 October 2011 the defendant's lawyer responded to the response of the complainant and the extension of the complaint.



On 18 January 2012 the preliminary investigator held a court hearing at which the complainant and the defendant were heard in Amsterdam. The expert witness summoned by the Disciplinary Court, Mr L.M. L., was also heard at this court hearing. A notarial record of this court hearing was drawn up.

On 8 February 2012 the preliminary investigator heard as a witness the first mate on board the Tempest, at the offices of ICT in Heemstede. With a view to the hearing of this witness the complainant was given the opportunity to formulate written questions. These questions of the complainant were put to the witness and answered by him at the court hearing on 8 February 2012. A notarial record was made of the hearing of this witness.

The preliminary investigator subsequently submitted the report on the preliminary investigation to the president of the Disciplinary Court. This report was sent to the complainant and the defendant by letter on 23 March 2012. The complainant sent the Disciplinary Court a further letter dated 25 March 2012 setting out some manifest writing errors that he had identified in the report.

In his ruling of 11 May 2012 the president of the Disciplinary Court rejected the complainant's complaint.

On 25 May 2012 the complainant's attorney lodged an objection to the decision. The objection was submitted in good time. The president of the court's decision was set aside as a result of the objection. The president of the Disciplinary Court responded by stipulating that a court hearing would be held and that he would have himself substituted at that session by one of his deputies. The deputy president stipulated that the oral hearing of the case would be held at 11.00 hours on 20 November 2012 at the offices of the Disciplinary Court in Amsterdam.

The court hearing was held on 20 November 2012.

The complainant did not appear. He had himself represented at the court hearing by Mr W.L.J. van Winden.

The defendant appeared at the court hearing. He was represented by his lawyer, Ms L.M. Schat, LL.M.



Neither the complainant nor the defendant summoned any witnesses and/or experts. The Disciplinary Court formally summoned expert witness C. P. to appear at the court session. The expert witness was placed under oath to perform his task in good conscience by the deputy president of the court.

## **2. The statement of complaint and the complainant's position**

The complainant is protesting about the actions taken by the defendant as the captain of the tug boat Tempest when securing the merchant shipping vessel Western, which was rudderless and adrift to the west of IJmuiden in the North Sea on 12 November 2012.

Put in concise terms, the complaint of the complainant, who at that time was the chief engineer on board the tug boat Tempest, is as follows.

**2.1** The complainant accuses the defendant of being seriously seasick when sailing out of the port of IJmuiden.

**2.2** The complainant accuses the defendant of tying up with the Western by casting a messenger line rather than using the line-throwing device present on board even though he, the complainant, had pointed this out. According to the complainant, opting to cast the messenger line on board the Western from the afterdeck placed the Tempest extremely close to the Western, posing a risk of collision.

**2.3** According to the complainant it can be seen in the video recordings that he made that the crew members of the Tempest on the afterdeck were repeatedly submerged by the seawater surging over.

**2.4** The complainant makes reference in the statement of complaint to the fact that the crew members were not secured on the afterdeck and also refers to survival suits.

**2.5** Finally, the complainant claims that the chains used to secure the towing wire broke when towing and that the use of such chains is a very unusual course of action.

In summary, the complainant claims in his introductory statement of complaint that the defendant: 'Needlessly placed the lives of those on board and his own ship the Tempest as well as the safety of the drifting vessel being salvaged at risk through lack of expertise, probably owing to a serious



lack of experience in the towing/salvage sector.

### **3. Additional complaint of the complainant**

In his letter of 23 October 2011 the complainant informed the Disciplinary Court that he wished to extend the scope of the complaint set out above. In concise form, the additions were as follows.

**3.1** According to the complainant, at the time of setting out the Tempest did not have an emergency stop for the port main engine. According to the complainant, this facility had already been defective for some time.

**3.2** According to the complainant working in the immediate vicinity of the towing winch on the afterdeck with seas surging over the deck is a precarious undertaking when there is a serious danger of collision. A person falling overboard would therefore have a minimal chance of survival.

### **4. The position of the complainant taken at the court hearing**

The complainant's attorney stated verbally (no written pleading was submitted) at the public court session of 20 November 2012, with reference to the content of the statement of objection (given below in a concise form):

**4.1** that first and foremost there was no independent expert involved in the preliminary investigation carried out by the preliminary investigator, but that in view of ground 2 of the statement of objection that complaint has apparently been upheld by the Disciplinary Court since Mr C. P. has been summoned as an expert witness.

**4.2** that in the second place the defendant acted contrary to the principles of good seamanship by approaching the Western on the windward side and that the captain wrongly failed to use a line-throwing device.

**4.3** furthermore, according to the complainant's attorney, there should be a properly working line-throwing device on board, the crew should know how to use it and if both requirements were not met the captain should not have left port. Although the defendant carried out the manoeuvre correctly and there were no accidents, he put speed before safety and thus put the vessel in danger, which is contrary to the principles of good seamanship.



## **5. The position of the defendant**

The defence of the defendant (dated 5 October 2011) – in concise form – includes the following information:

Captain V. has worked at ITC since 1 May 2008. Before being promoted to captain in November 2010, Captain V. had gained the necessary experience on ITC's ships, first as first mate, anchor handling captain and driving mate (also known as second captain). Captain V. is able to manoeuvre ITC ships in all operations under all weather conditions.

In the morning of 12 November 2010 Captain V. was informed that the ocean-going vessel Western was in difficulty owing to engine problems. Half an hour after receiving that message the Tempest cast off and set course for the Western.

There was a strong wind, Beaufort force 7 to 8, from west-south-west. There were considerable ground seas in front of the harbour entrance of IJmuiden, which forced Captain V. to reduce speed to get through the breakers. Contrary to the claim made by Elsman, Captain V. was not suffering from seasickness.

Captain V. took the Tempest safely through the breakers into calmer waters and after an hour handed over the helm to the second mate. After steaming for about four hours the Tempest arrived at the location of the Western. The Tempest evaluated the situation from a distance of just under a mile and the captain decided on and went through the plan of action in consultation with the first and second mates and the boatswain.

During that meeting Captain V. proposed reversing up to the Western from the windward side and manually transferring the heaving line. The second mate suggested using the 'rocket launcher' for this purpose. Captain V. then asked his first and second mates which crew members had experience with using the rocket launcher. Because no answer was given the captain assumed that nobody on board had sufficient experience to use the line-throwing device without any danger. That is why the captain decided to transfer the heaving line by hand.



Once the captain had discussed the entire procedure with the first and second mates the boatswain was summoned to the bridge to be given the instructions for the seamen. The captain then went through the entire procedure with the first and second mates.

The boatswain indicated during the meeting that he preferred the seamen not to put on exposure suits because although they would keep the crew dry in the given circumstances, they would also hinder them in their work. The captain gave his approval for the crew not to wear the exposure suits.

The procedure was then carried out precisely as discussed. The Tempest reversed up to the Western from the windward side and the heaving line was transferred by hand, after which the connection was made and the Western was towed safely to IJmuiden.

#### **6. Response of the person concerned to the extension of the complaint**

The defendant's response to the extension of the complaint includes – in concise form – the following.

The comment made by Mr Elsman about the towing winch makes no sense. The towing winch is a fixed and familiar part of an anchor handling tug. Mr Elsman is wrongly involving that part in the complaint with the sole purpose of making his complaint more dramatic.

Mr Elsman further claims that an emergency stop had already been defective for some time. If that had been the case, it is telling that Mr Elsman is holding only Captain V. to account for this and not all of the other captains who sail under similar circumstances. If Mr Elsman had really been so concerned, he should have reported the matter to Port State Control. The fact that he failed to do so makes his version of events implausible. It is also the case that Mr Elsman limits himself to unfounded claims. However it is up to him to prove that the emergency stop was not working when the ship left port and that he informed Captain V. of this in the seven days between signing on and providing emergency assistance. Captain V. has a different recollection of this. Captain V. denies that the emergency stop was defective when he left port on 12 November 2010. Captain V. does however remember



once being told something (but not during the relevant period on board) about a defect, but he was also told directly at that time that this was not a problem since one of the engineers would be able to stop the machines from the engine room. Furthermore, Captain V. – in consultation with Elsman! – once tested the emergency stops. At that time they were both working. Mr Elsman was at that time furious that he had not been informed that the defect had been repaired.

Mr Elsman clearly has a distorted impression of reality and also makes reference to all sorts of irrelevant aspects, whilst the question is ultimately about whether captain V. has any charges to answer regarding the provision of the emergency assistance. This question can be answered in the negative without any further investigation. The video images show an extremely relaxed but focused Captain V. who, together with his experienced crew, has tied up with the Western and then takes this vessel to a safe harbour, which Elsman himself proudly confirms in the weekly shipping journal *Schuttevaer*.”

## **7. The position of the defendant taken at the court session**

Without submitting a written pleading the defendant’s lawyer has raised points including the following (given in abridged and concise form below).

It follows from the objection of complainant Elsman (25 May 2012) that Elsman takes the view that Captain V. did not act in accordance with the principles of good seamanship on the following two grounds: (a) approaching on the windward side and (b) failing to use the line-throwing device. Elsman is also of the opinion that the witness (Mr L.) is not independent. Elsman has not objected to any other of the president’s findings. Captain V. therefore assumes that the complaint is now limited to the scope of the statement of objection.

Captain V. made his decision to approach on the windward side on well-considered grounds and discussed this with his officers. There were two reasons for not approaching the Western on the lee side:

- The Western was drifting more strongly and faster than the Tempest, which presented a danger of the Western drifting over the Tempest, which



would pose a threat to both vessels and their crews;

- If the Tempest had reversed up to the Western from the lee side, it would have been positioned with its low, half-open afterdeck directly into the meters-high waves, which would then have had free reign on the afterdeck, thus preventing the crew members from doing their work properly and certainly presenting a risk of people being swept overboard.

In consultation with the officers Captain V. decided to tie up with the Western by manually transferring a heaving line (messenger). Using the line-throwing device was considered, but not done following consultations and for the right reasons. Neither was this necessary: the seamen quickly successfully connected up to the Western. This should come as no surprise since the seamen have ample experience of casting a messenger line.

Elsman accuses Captain V. of failing to use the line-throwing device. Elsman suggests for the first time in his objection that leaving port with a crew that is unable to use a line-throwing device is contrary to the principles of good seamanship. Regardless of the merits of this (this is disputed), this is (once again) a change to the petition that alters the essence of the accusation. I therefore request that this amendment not be allowed (case 2010, V3 and article 10 of the regulations of the Maritime Disciplinary Court of the Netherlands).

Captain V. never doubted that under the given circumstances his crew would be able to quickly and expertly tie up with the Western by using a messenger line. After all, the Tempest is frequently used for offshore work and the day-to-day work of the crew – in fair weather or foul – is to tie up to vessels such as crane ships in order to transfer the anchors. The expertise of the crew is also clear from the speed at which they successfully tied up to the Western.

During the meeting prior to the provision of the assistance the second mate also suggested using the line-throwing device. Captain V. had experience with the line-throwing device, but that experience was not favourable. He therefore asked whether the first or second mates had any (favourable) experience with this. There was no reply, from which Captain V. gathered – and was entitled to gather – that the answer to his question was negative.





Furthermore, the line-throwing device is not a precision piece of equipment. It remains a powerful piece of equipment that is not without its dangers. Also, the crew would have had to perform all kinds of antics on the afterdeck to use the line-throwing device.

The dangers of the line-throwing device (such as the possibility of hitting antennas and the ability of the crew of the towed vessel to catch the line) are described in the generally known manual Towing, Oilfield Seamanship, M. Hancox, volume four. It is concluded in the book that: *As a generalisation it is usually possible to make a connection using a heaving line and messenger rather than using the rocket line.*

After viewing the images and being informed about the actual conditions, the independent expert stated that: *If it would not take too long (to use the 'messenger') I would use a line-throwing device.* Neither does the expert witness consider the use of the 'messenger' to be contrary to the principles of good seamanship.

Once again, the suggestion that Captain V. put speed before safety is nonsensical. It was of course important to Captain V. to complete this operation successfully and before darkness fell. But obviously not at the expense of his crew or ship. Furthermore, speed and safety go hand in hand: opting for a tried-and-tested method made it possible for the crew to quickly tie up with the Western and they worked on deck for the shortest amount of time possible.

## **8. Findings of the expert witnesses summoned by the Disciplinary Court**

The expert witness Mr C. P. who was summoned by the Disciplinary Court to the hearing of 20 November 2012 was asked whether he was able to make any general statement about that which had been sent to him by the Disciplinary Court and the complete case file that he had studied, including the images and video recordings submitted by the complainant. Expert witness P. felt that a successful operation had been completed. The result was good.

Asked by the Disciplinary Court whether he would have used a line-throwing device in this situation, P. replied 'no'.



Asked by the Disciplinary Court on which side the Tempest should have approached the Western in the given circumstances, the windward or the lee side, P. replied that in this situation he would have opted for the windward side. These matters depend on the manoeuvrability of the ship and the type of ship. The Tempest was not closed at the stern.

The Disciplinary Court also asked the expert witness during the court session whether the fact that the crew members on the afterdeck were frequently submerged as claimed by the complainant is normal or whether this is an exceptional situation.

P. answered this question by saying that he did not see anybody being submerged in the images and video images submitted. According to him, the water came up to knee height. This will involve sometimes being submerged. If the vessel had sailed in reverse in this case the crew would have been swept away. Sailing on the windward side prevented water from getting in at the stern.

Asked by the Disciplinary Court whether the swell was such that the Tempest could sail close to the Western, P. replied that he did not notice in the images shown to him that the Tempest was approached too closely. The ship was well manoeuvrable and was located upwind.

The Disciplinary Court also asked P. why the line-throwing device was kept on board. He replied that it is kept on board for emergencies, and that this situation did not constitute an emergency.

The complainant asked whether P. was of the opinion that a ship without a properly working line-throwing device or a crew that is able to operate one should be allowed to leave port. P. answered this as follows: 'yes, you can leave port in that case. This happens very often. A line-throwing device is a dangerous piece of equipment. You can shoot someone dead with one. There are instructions on board about how to use a line-throwing device. In accordance with the relevant certification requirements there must be an operational line-throwing device on board. There is nothing to say that the crew must be proficient in its use. It is stipulated that once the line-throwing device has been shot, it cannot be used again.'

P. additionally stated that he regarded an emergency situation as being when a ship has run aground. In that case you can shoot the line-throwing device to another ship for assistance. Use of a line-throwing device is also a good choice if you are unable to approach sufficiently closely. The line-throwing device is used only as a last resort.



The expert witness summoned by the Disciplinary Court, Mr L.M. L., was asked and gave answers to the following questions during the Disciplinary Court's preliminary investigation on 18 January 2012.

Do you have any general comments after viewing the images?

I would first like to offer the captain my compliments for keeping the ship in line during this difficult period. The captain placed the ship properly in relation to the wind. The only remark concerns people being on deck without protection. No remarks concerning the operation.

How would you have used the line-throwing device in this situation?

If things were taking too long I would use a line-throwing device, especially if you could launch it with the wind. That could make it possible to reduce the time it takes to tie up to the other ship.

On which side should the ship be approached from? The windward or the lee side?

The windward side, the captain had the ship in the right position.

Is it normal for the crew to be submerged or is this an exceptional situation?

That's the point, a salvage vessel would usually have a closed stern. With this type of ship you have an open stern and a lower bulwark – in that case it's normal for a lot of water to surge over the deck. That's why it was correct for the captain to stay on the windward side. The crew members were wearing survival suits, but they are not secured. That could cause problems in the event of their getting caught up.

## **9. The ruling of the Disciplinary Court**

### **9.1 The facts**

Based on the exchanged documents, the statements made, the answers given by the expert witnesses to the questions put to them in this issue, a plausible case has been made in this matter to support the following facts.

On 12 November 2010 the Dutch tug boat Tempest (PHXV), an 'anchor handling/salvage/tug boat', commanded by Captain A. V., secured a towing line in daylight and in good visibility to the rudderless, drifting merchant ship



Western. This was done in the North Sea a few hours sailing to the west of IJmuiden.

During this operation there was a strong to stormy wind from the south westerly direction, wind force 7 to 8 Beaufort. There was also a considerable swell.

Upon arriving at the location of the Western Captain V. decided to sail astern to approach the stricken vessel on the windward side. That way the Western was approached on its port side by the Tempest, sailing and manoeuvring astern. A towing connection was made with the Western by means of a heaving line with a messenger thrown by the crew of the Tempest. The ship was then taken to safety in the port of IJmuiden by the Tempest.

## 9.2 The complaint

At the court session of 20 November 2012 the complainant's attorney, making reference to the statement of objection that he submitted on 25 May 2012, stated that the complaint in objection is twofold and constitutes the accusation (1) that the principles of good seamanship were not observed as regards approaching the Western on the windward side of the ship (ground 1a of the statement of objection) and (2) that the line-throwing device was not used to make the towing connection (ground 1b of the statement of objection). The complainant's attorney also claimed at the court session that there was initially no independent expert and that the Disciplinary Court has manifestly allowed this complaint since Mr P. appeared at the court session as an expert witness (ground 2 of the objection). The Disciplinary Court understands this to mean that the complaint about the expert witness L., who was not considered to be independent, has been withdrawn by the complainant at the court session. The complainant's attorney did not expressly claim at the court session that the other complaints as laid down in the statement of complaint dated 16 May 2011 and supplemented with complaints on 23 October 2011 have been withdrawn.

The complainant added to his complaint in his letter of 23 October 2011. In the judgement of the Disciplinary Court it is only permissible to make additions to a complaint if the essence of the accusation remains unchanged. That is not the case concerning the complainant's additions to the complaint as described above in section 3 of this ruling with regard to leaving port without an emergency stop on the port main engine and the crew members



working in the vicinity of the towing winch. The additions are not admissible. The Disciplinary Court will nonetheless give a judgement on them.

It has not been demonstrated that the emergency stop facility on the port main engine was not working at the time of the emergency assistance operation. In the judgement of the Disciplinary Court, the mere statement of the complainant, which the defendant has refuted giving reasons, is not sufficient to assume that the emergency stop was not functioning on 12 November 2010 and that leaving port was contrary to the standards of good seamanship.

With regard to the additional complaint that working on deck in the vicinity of the towing winch was a precarious undertaking it is important to note the statement made in that regard by expert witness P.: 'Sailing on the windward side prevented water from getting in at the stern' and 'I did not see that the ship was approached too closely. The ship was well manoeuvrable and was located upwind.' In the judgement of the Disciplinary Court this refutes the complaint of the complainant that 'working in the immediate vicinity of the towing winch on the afterdeck with seas surging over the deck (was) a precarious undertaking'.

Since it was necessary to work on the afterdeck – which is explained in more detail below – in connection with making the towing connection, the court judges that the crew members working in the vicinity of the towing winch cannot be considered to be contrary to the principles of good seamanship.

In part 2 of the objection and at the court session the complaint has been supplemented with the claim that the defendant should not have left port without a properly working line-throwing device on board and that the crew was unable to operate that device.

In the judgement of the Disciplinary Court, this is not an admissible addition to the complaint. It is a variant of the additional accusation made by the complainant on 23 October 2011 regarding 'leaving port without an emergency stop.' The Disciplinary Court adds to this on the one hand that it has not been argued or become evident that there was no properly working line-throwing device on board the Tempest when it left port and on the other hand that it has not been demonstrated that none of the crew members (including the captain, who did have experience) was able to operate the



device should that have been necessary. For those reasons the claims made by the complainant are not sufficient to conclude that the defendant should not have left port.

The complainant accuses Captain V. of the Tempest of acting contrary to the principles of good seamanship by approaching the ‘Western’ from the windward side and tying up with the ‘Western’ by means of a messenger line rather than using a line-throwing device, which is also contrary to the principles of good seamanship.

The defendant approached the ‘Western’ on the windward side of that vessel. One of the reasons he gave for this is that the ‘Tempest’ has an open stern, so that approaching on the lee side would cause more water to surge over the ship because the open afterdeck, which does not have a closed railing, would then go straight into the metres-high waves. This would place the crew members working on the afterdeck in more danger. In the opinion of the independent expert P., who is considered by the complainant to be independent, which opinion is shared by the expert witness L. who was heard during the preliminary investigation and considered not to be independent by the complainant, approaching the Western from the windward side was the right approach to be taken by the Tempest. The defendant has indicated that if he had approached from the lee side more water would have surged over the ‘open’ afterdeck, placing the crew members in more danger. In view of the above the Disciplinary Court judges that the Tempest approaching the Western on the windward cannot be said to be contrary to the principles of good seamanship.

The crew needed to work on the afterdeck of the Tempest in order to make the tow connection with the Western on its windward side with the aid of a messenger line. The complainant accuses the defendant of failing to use the line-throwing device to make the connection in the given situation.

In the given situation the expert witness P. would not have used the line-throwing device but would also have used the messenger line. Neither would expert witness L. have used the line-throwing device unless connecting the towing line with a messenger line would have taken too long. That was not the case here.

Expert witness P. takes the view that the line-throwing device should only be used in emergencies, and that was not the case here. The first mate of the



Tempest, in reply to a question put to this witness, also replied along the same lines ('I would use it as a last resort'). The Disciplinary Court shares the judgement of the expert witness and the mate and concludes that not using the line-throwing device is not contrary to the principles of good seamanship.

In the judgement of the Disciplinary Court it cannot be seen in the images and video recordings submitted by the complainant that, as claimed, the crew members of the Tempest working on the afterdeck were frequently completely submerged. Neither did the expert witness P. see anybody frequently being submerged in the images made by the complainant. In his statement of defence of 5 October 2011 the defendant also disputes this aspect of being submerged. In this case the Disciplinary Court understands being submerged to mean the crew members 'being completely under water' (Van Dale 12th edition). The complaint therefore has no factual foundation.

In the judgement of the Disciplinary Court it has not been proven that during this emergency assistance operation the defendant put speed before safety. P. found that it to be a successful operation and L. had no remarks to make about the operation.

According to the Disciplinary Court the exchanged documents and submitted images and video recordings do not show that the defendant was seasick.

The Disciplinary Court is not entirely clear about what accusation the complainant is making regarding lifelines and survival suits. The complainant has not given any further explanation of what he is accusing the defendant of. The Disciplinary Court will therefore leave these two subjects aside.

The mere fact that the two towing chains broke during the towing operation – the complainant has not made any further claims about the cause of this – is not sufficient for the Disciplinary Court to assume that the defendant acted contrary to the principles of good seamanship in this regard.

## **10. Disciplinary measure**

The complaint submitted against the defendant is dismissed. There is therefore no disciplinary measure to be imposed.



## **11. The decision**

The Disciplinary Court dismisses the submitted complaint.

This ruling was given by E.A. Bik, deputy president of the disciplinary court, F. Karmelk and P.J. Lensen, members, and J.F. Krijt, R.J.N. de Haan, deputy members, in the presence of D.P.M. Bos as deputy secretary and was pronounced by E.A. Bik in public session on 15 January 2013.

T.P. Tammes

E.A. Bik

Forwarded: 15 January 2013

An appeal against this decision can be lodged within six weeks of the date of the forwarding of this ruling with the Dutch Trade and Industry Appeals Tribunal ('College van Beroep voor het Bedrijfsleven'), Prins Clauslaan 60, 2595 AJ The Hague, P.O. Box 20021, 2500 EA The Hague, the Netherlands.